THARMALINGAM v. SAMBANTHAN

[O. C. J. (Ong J.) May 27, 1960]

[K. L. — Civil Suit No. 265 of 1958]

Domestic Tribunal — Unincorporated Association — Suspension without hearing — Natural justice — Audi alteram partem — Construction of association's constitution — Meaning of "is satisfied" — Mala fides — Provision for appeal to Working Committee — Whether person suspended must utilise such procedure before issuing writ.

The plaintiff was a member of the Malayan Indian Congress and was suspended, without being given the opportunity of being heard, from the said membership in 1958 by the President of the M.I.C. acting under section 28 of its Constitution. Section 28 reads: "Disciplinary Action: Suspension by President. The President of the Malayan Indian Congress shall have power to suspend a member if he is satisfied that, that member is acting in a manner in any way detrimental to the Congress. As a precaution against the abuse of this power the member so suspended shall have the right of appeal to be heard at any subsequent meeting of the Working Committee, whose decision after hearing both the appeal and the President's Justification of his action shall be final and conclusive." The plaintiff did not pursue his right under the said section 28 but brought an action for a declaration that his suspension from membership was null and void and consequential relief.

Held: (1) the test which determined the satisfaction of the President under section 28 was a subjective one and that no other conditions, e.g. observance of the *audi alteram partem* rule, opportunity of a hearing being given, could be read into it. *Ross-Clunis* v. *Papadopoullos & Ors.*, (1) and *Green* v. *Howell* (2) applied;

(2) it is incumbent upon the plaintiff to pursue his appeal to the Working Committee before he issued his writ. *White* v. *Kuzych* (3) applied;

(3) no *mala fides* had been established;

(4) as the question whether or not the plaintiff's conduct was detrimental to the M.I.C. was a question of fact, the Court could not be justified in intervening;

(5) therefore, the case was one in which the Court would not interfere, the designated domestic tribunal being far more competent to determine the question than any Court in the land.

Cases referred to:—

(1) *Ross-Clunis* v. *Papadopoullos & Ors.*, [1958] 2 All E.R. 23, 32.
(2) *Green* v. *Howell* [1910] 1 Ch. 495.
(3) *White* v. *Kuzych* [1951] A.C. 585, 601.
(4) *Dawkins* v. *Antrobus* (1881) 17 Ch. D. 615, 630.
(5) *Lee* v. *The Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 342.
(6) *Price* v. *Rhondha U.D.C.* [1923] 2 Ch. D. 372, 389.
(7) *Short* v. *Poole Corporation* [1926] Ch. D. 66, 68.
(8) *Barber* v. *Manchester Regional Board* [1958] 1 W.L.R. 181.

CIVIL SUIT:.

R. R. Chelliah for the plaintiff.

Athi Nahappan for the defendant.

Cur. Adv. Vult.

Ong J.: This is an action of some complexity involving the interpretation of certain Rules in the Constitution of the Malayan Indian Congress and, in particular, raises the question whether the President has power to suspend a member without first giving him an opportunity of being heard. The plaintiff claims a declaration that his suspension from membership is null and void, an injunction to restrain the defendant from denying him the exercise of his rights and privileges as a member, damages and costs.

The plaintiff is a general merchant and Government contractor. Since 1947 he had been a primary and ordinary member of the Malayan Indian Congress, hereinafter referred to briefly by its initials. On May 16, 1958 he held the offices of (a) President of the Pudu Branch of the M.I.C., (b) an elected delegate of the said Pudu Branch to the Selangor State Congress of the M.I.C., (c) an elected delegate of the said Pudu Branch to the Delegates Conference of the M.I.C., (d) Honorary Secretary to the Selangor State Congress of the M.I.C., (e) a representative of the Selangor State Congress of the M.I.C. to the Selangor State Alliance Committee, and (f) a representative of the Selangor State Congress of the M.I.C. to the Kuala Lumpur District Alliance Committee.

On May 16, 1958, which was two days before the election of office bearers at the Annual Delegates Conference of the Selangor State Congress, the plaintiff received from the defendant, who then was, and still is, President of the M.I.C., a letter suspending him from membership of the M.I.C. in these terms:

> "This is to inform you that I have decided to suspend you forthwith from membership of the Malayan Indian Congress.
>
> You have, in accordance with section 28 of the M.I.C. Constitution, the right to appeal to the Working Committee.
>
> If you wish to appeal to the Working Committee, you may indicate your desire to the Secretary-General, who will then inform you the time and date at which your appeal will be heard."

The plaintiff alleges, in his statement of claim, which is not denied, that he was not given any reasons for his suspension, nor any notice of the defendant's intention so to do, nor any opportunity to answer any charges against him. He further alleges, in paragraphs 6 and 7, that he had not acted "in a manner in any way detrimental to the Congress," and contends that, in suspending him from membership, the defendant (i) had not acted *bona fide*, (ii) had acted capriciously and maliciously and not in the exercise of any judicial discretion and (iii) had acted contrary to the principles of natural justice. Finally, he alleges that, in the result, he was wrongfully prevented from attending the Annual Delegates Conference of the Selangor State Congress on May 18, 1958, and was thereby wrongfully deprived of his right to vote, and of his patrimonial interest and right to be elected to office, in consequence of which he has suffered injury in his credit and reputation.

The defendant's case is that — while denying the allegations in paragraphs 6 & 7 of the Statement of Claim — in suspending the plaintiff, he had acted in his official capacity as President of the M.I.C., and in exercise of the power given to the President by Rule 28; that the plaintiff

ought to have exercised his right of appeal under that Rule but had not done so, and that consequently the plaintiff had no cause of action.

At the trial of this action only the plaintiff gave evidence, in the course of which he stated that he had not acted in any way detrimental to the interests of the M.I.C. On this point he was not cross-examined, and no evidence was called on behalf of the defendant to the contrary.

The plaintiff further stated that, by reason of his suspension, he was disabled from standing for election in the Selangor State Congress as its President or Secretary, as he had intended, and, in addition, he had lost all the offices he previously held, except that of President of the Pudu Branch. He gave it as his opinion that the defendant feared that he, the plaintiff, stood in the way of the defendant's advancement, because the plaintiff was a dangerous adversary within the Party, and for that reason he claimed that the defendant had not acted in good faith by suspending the plaintiff's membership in order to debar him from the election. As to his neglecting to appeal to the Working Committee, the plaintiff said that he did not avail himself of this course because he took the view that it could not have served any useful purpose, as the Selangor State Delegates Conference had already been fixed for May 18. The defendant did not give any evidence himself or call any witness.

I think it will be convenient, at this stage, to quote the relevant rules in the Constitution, which are the only ones therein relating to suspension of members.

They are:

"28. DISCIPLINARY ACTION:

Suspension by President.

The President of the Malayan Indian Congress shall have power to suspend a member if he is satisfied that, that member is acting in a manner in any way detrimental to the Congress.

As a precaution against the abuse of this power the member so suspended shall have the right of appeal to be heard at any subsequent meeting of the Working Committee, whose decision after hearing both the appeal and the President's Justification of his action shall be final and conclusive.

29. EXPULSION & SUSPENSION OF MEMBERS BY WORKING COMMITTEE.

If any member acts in the opinion of the Central Working Committee in any way detrimental to the interests of the Congress or acts in any way contrary to the principles or objects or violates the constitution of the Congress or does not abide by or violates the directives issued by the Working Committee, then the Central Working Committee shall call upon the member concerned to show cause why he should not be suspended or expelled from the Congress. The Working Committee shall then convene a meeting of enquiry to consider the conduct of such member and the action if any, to be taken thereon. Notice of such enquiry shall be sent by registered post to the member whose conduct is complained of not less than 15 days before the date fixed for the holding of the enquiry. At any such enquiry the member concerned shall have the right to be heard in his own defence. If 60% or more of the Central Working Committee members present at the said enquiry vote for the suspension or expulsion of the said member, he shall thereupon be suspended or expelled from membership of the Congress. Notice of such suspension or expulsion shall thereafter be sent to such member within 7 days of the decision.

Any member suspended or expelled shall have the right of appeal at the next meeting of the Malayan Indian Congress Committee. The member desiring to appeal should do so within fourteen days of the receipt of his notice of suspension or expulsion.

A member who has been expelled may apply for membership of the Congress after an expiry of two years to the Working Committee who may allow him to rejoin the organisation."

It is clear that the parties hold diametrically opposite views with regard to the President's power of suspension under Rule 28. The plaintiff's contention is that, in exercising this power, the President must observe the principle of *audi alteram partem*, and Mr. Chelliah submits that the words "if he is satisfied" imports the requirement that any proceedings for suspension should be in accordance with rules of natural justice. The defendant, on the other hand, contends that the Rule empowers the President to act in an executive capacity, and not as a quasi-judicial tribunal, and it imposes upon him no obligation to state his reasons for suspension, or to give notice of his intention to the member concerned, or to afford him an opportunity of being heard. The issue, therefore, depends upon the true construction of Rule 28, and upon the consideration of the principles of law applicable to voluntary associations.

It is axiomatic that, in disputes between members of such an association, the rights of the plaintiff must depend on contract, because, by accepting membership of the association he contracted to be bound by its rules. Hence the material terms of their contract must be sought in the rules of the association. The plaintiff himself in no way questions the validity of Rule 28. Such being the case, it seems to me that the question resolves itself into this: does Rule 28 give the plaintiff any cause for complaint if natural justice was not done to him?

In my opinion the only condition which the Rule imposes on the President is that he should be satisfied that the member is acting in a manner in any way detrimental to the Congress. I can see no difference between the words "if he is satisfied" in this case, and "satisfy himself" in *Ross-Clunis* v. *Papadopoullos & others*, [1] where regulation 5(2) of the Cyprus Emergency Powers (Collective Punishment) Regulations 1955 fell to be considered. That regulation provided that, in holding an enquiry required to be had before imposing a collective fine, the Commissioner must "satisfy himself" that the inhabitants of the areas were given an adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon. The Judicial Committee expressed their opinion that the subjective test applied, with certain qualifications, in these words:

"Counsel for the appellant submitted that the only duty cast on the appellant was to satisfy *himself* of these facts: that the test was a subjective one, and the statement in para 12 of the appellant's affidavit of

December 4, 1956, was a complete answer to the argument of counsel for the respondents, unless it could be shown that the statement in the affidavit was not made in good faith, and bad faith was not alleged.

Their Lordships feel the force of this argument, but they think that if it could be shown that there were *no* grounds on which the appellant could be so satisfied, a court might infer either that he did not honestly form that view or that, in forming it, he could not have applied his mind to the relevant facts."

I am unable to read into the words "if he is satisfied" any further implication that, apart from the subjective test, other conditions must be complied with before the President can take valid action to suspend a member. Rule 28 must be read as a whole, and it is abundantly clear, from the second part of this Rule, that such a situation as has arisen in the present case was contemplated and expressly provided for. The framers of the constitution took a calculated risk that the power may be abused, and they accordingly provided against such a possible eventuality by giving the suspended member a right of appeal to the Working Committee, where the aggrieved member would have his opportunity of being heard, and the President would have to justify his own action. It may be observed, by contrast, that Rule 29 contains detailed provisions for the aggrieved member to show cause against action proposed to be taken against him.

On this point Mr. Nahappan, for the defendant, submits that the President is necessarily cast in the role of complainant or litigant, having to justify his action as an executive officer to the Working Committee. He has cited *Green* v. *Howell*[2] in which case one partner, without any preliminary warning to his co-partner, served him a notice of dissolution on the ground of breaches of his duty as a partner, and purported to do so pursuant to one of the clauses in the deed of partnership. It was held by Neville J. that the partner giving the notice was only putting certain proceedings into train whereby it should ultimately be decided by the proper tribunal. On appeal, Cozens-Hardy M.R. in the course of his judgment, said:

"A clause like this enabling one partner to expel the other cannot be relied upon unless there is good faith; it cannot be used if the motive is really to get an undue advantage over the other partner by purchasing him out on unfavourable terms; but that is the root of the principle, so far as I am aware, applicable to partners in these relations. There is also a further principle, not in any way confined to partnership transactions, which is this, that wherever it is left to a judicial tribunal, strictly so called, or a quasi-judicial tribunal, to determine whether a person is or is not properly excluded, common justice requires that explanation and notice shall be given to the person said to be amenable to the jurisdiction and that he should have an opportunity of defending himself. In the present case I am not satisfied that there has been any ground for invoking either of these principles. The learned judge has found as a fact, and I see no reason to doubt it, that there has been no unfair dealing, no unfair taking advantage on the part of the plaintiff. Is it possible to say that the plaintiff acting under clause 17 was in a judicial position or quasi-judicial position? Plainly not. He was really, so to speak, the moving party, the litigating party, the person who was starting proceedings which would ultimately lead to a proper adjudication on the rights of the parties."

Later, he continued:

"It seems to me the fair reading of this clause 17 is this: The plaintiff, one of the two partners, believes and asserts that there has been a breach entitling him to determine the partnership. He gives notice of that, but he does not in any way act in a judicial character. All he does is to start proceedings, leaving it open to the defendant to appeal to the domestic tribunal which the parties have agreed upon, namely, the arbitrator, to decide whether a case has happened which justifies the expulsion. If that is not sufficient, then by the ordinary procedure of the Courts of Justice the Court has to decide that question."

Buckley L.J. said:

"In acting under that clause the partner who was serving the notice was in no sense acting in a judicial or quasi-judicial capacity. He was not a person determining anything at all. He was a person asserting something."

Further on, he said:

"I do not see, taking this particular case, that the plaintiff was in any sense or meaning of the words acting in a judicial or quasi-judicial capacity when he was taking upon himself to assert that the defendant was committing a breach of the articles. If he was not, there was no reason why he should hear him."

I think there is much force in Mr. Nahappan's argument, and, in the view I take of Rule 28, the defendant occupies a position analogous to that of the defendant in *Green* v. *Howell*. Consequently, and to paraphrase the words of the learned Master of the Rolls, the suspension of the plaintiff was not invalid "simply because before giving the notice" of suspension, the defendant had not given the plaintiff "an opportunity of explaining and had not stated more explicitly the grounds on which he chose to act."

If I am right in my interpretation of Rule 28, the proper steps for the plaintiff to take, upon receipt of the notice of suspension, should have been to appeal to the Working Committee. This course was pointed out to him by the defendant in paragraphs 2 and 3 of his letter. The plaintiff, however, elected not to avail himself of the right of appeal expressly reserved for him in such a contingency, and has chosen, instead, to come to Court. But, is it open to him to do so?

Mr. Chelliah submits a number of reasons why the plaintiff had to take this course. He says it is the plaintiff's only effective remedy and the only prudent course. The first point he takes is that the defendant's action was contrary to natural justice. I have already held that compliance with the *audi alteram partem* rule is not essential to the validity of a suspension by the President and, this point need not detain us further.

The next point that Mr. Chelliah takes is that the Rules of the M.I.C. in no way debar the plaintiff from recourse to the courts, nor is it necessary that he should have first exhausted the remedies open to him before he does so. As a general statement of the law, that parties cannot by contract oust the ordinary courts from their jurisdiction, or prevent the decisions of private tribunals being examined by the courts, he is of course perfectly correct. I do not think, however, that the second part of his proposition can

be applied to this case. He has cited a number of authorities in support of his contention that the plaintiff is entitled to seek relief in court for his suspension, but with respect, I do not think I need refer to, or discuss, any of them. All I need say is that in none of them have I found any rules even remotely bearing some resemblance to Rule 28, with the interpretation of which only I am immediately concerned. Nor has it ever been the defendant's contention that the plaintiff is absolutely debarred by the rule from recourse to the court in any event, Mr. Nahappan's submission is only that this is a case in which the court, in the exercise of its discretion, will decline to interfere, when the parties have agreed to leave the question for the decision of a domestic tribunal which is best qualified to deal with it, and that tribunal had not even been given the opportunity to inquire into the matter before the plaintiff issued his writ in this action.

My view on this point may be stated quite briefly. The defendant cannot, without any or sufficient reason to the contrary, be permitted to set at nought rules by which he had agreed to be bound. Effect must be given, if possible, to the provision in Rule 28 that the decision of the Working Committee "shall be final and conclusive". The plaintiff has not been able to put forward any grounds for me to suppose that it would have been useless for him to appeal to the Working Committee, or that they would be incapable of giving their decision in an honest and impartial spirit. If, in the appeal, the Committee should act in breach of the rules of the M.I.C., or of natural justice, or otherwise by their action or decision give legitimate cause for complaint, then only, in my opinion, would the plaintiff be entitled to ask the Court to examine their decision. I think, therefore, that upon the proper construction of Rule 28 it was incumbent upon the plaintiff to pursue his appeal to the Working Committee before he issued his writ, and I would, with respect, apply the same principle as the Judicial Committee did in *White* v. *Kuzych*.[3]

The remaining point taken by Mr. Chelliah is that in suspending the plaintiff, the defendant had not acted *bona fide*, but capriciously and maliciously, and on this ground the plaintiff is entitled *ex debita iustitise* to relief from the Court. In this connection, I would refer to *Dawkins* v. *Antrobus*,[4] where the jurisdiction of the Court to intervene in the decisions of domestic tribunals is laid down by Brett L.J. in these terms:

> "I think we ought to take great care that this Court does not by successive decisions usurp an authority in these cases for which there is no colour in point of law. In my opinion there is some danger that the Courts will undertake to act as Courts of Appeal against the decisions of members of clubs, whereas the Court has no right or authority whatever to sit in appeal upon them at all. The only question which a Court can properly consider is whether the members of the club, under such circumstances, have acted *ultra vires* or not, and it seems to me the only questions which a Court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of a club — in other words, whether the rules of the club are contrary to natural justice; secondly, whether a person who has not condoned the departure from them has been acted against contrary to the rules of the club, and thirdly, whether the decision of the club has been come to *bona fide* or not. Unless one of those charges can be made out by those who come before the Court, the Court has no power to interfere with what has been done."

In *Lee* v. *The Showmen's Guild of Great Britain*,[5] Denning L.J. (as he then was) said:

> "The question in this case is: to what extent will the courts examine the decisions of domestic tribunals on points of law? This is a new question which is not to be solved by turning to the club cases. In the case of social clubs, the rules usually empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club; and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules: but they will not otherwise interfere: see *Labouchere* v. *Earl of Warncliff* and *Dawkins* v. *Antrobus*."

Mr. Chelliah concedes that the onus is on the plaintiff to satisfy the Court that the defendant had not acted *bona fide* This is merely in accordance with the principle stated by Eve J. in *Price* v. *Rhondha U.D.C.*[6] that it lies on those who assert that another did not act in good faith to prove the truth of that assertion if they can. (See also *Short* v. *Poole Corporation*[7] and *Barber* v. *Manchester Regional Board* [6]).

Mr. Chelliah argues that this is not a case in which there was some evidence to justify the defendant's action; in such event, he admits, the Court will not intervene. Here, he says, there is no evidence whatsoever, before the Court, of action on the part of the plaintiff detrimental to the M.I.C. And not only is such evidence lacking, but also the further undisputed facts: that there had been no prior inquiry, that the defendant's action was taken only two days before the Selangor State Congress meeting, and that action could have been taken by the alternative disciplinary authority under Rule 29, which was not done. Their cumulative effect, he contends, is to establish conclusively *mala fides* in the defendant.

There is no doubt in my mind that Mr. Chelliah relies very strongly on the failure of the defendant to give evidence himself, or to call witnesses, to rebut the plaintiff's statement that he had never acted in any manner detrimental to the M.I.C. It is true that, ordinarily, when a party makes an allegation of fact, and his statement is neither challenged in cross-examination nor contradicted by evidence, such allegation is deemed to have been admitted. In the present case, however, I do not think the rule applies, for this reason. If the plaintiff is entitled to appeal from the defendant's decision to the Court as the

proper tribunal, instead of the Working Committee, then the defendant is bound to justify his action and state the grounds upon which he came to his decision. If however, the plaintiff must pursue his appeal in the domestic tribunal, and he elects, in contravention of the rules, not to do so, I do not think that he can thereby compel the defendant to justify his action in open Court, and to divulge reasons which may be most cogent, but detrimental to the most vital interests of the Congress, if disclosed to the general public. No party can derive any advantage from any default by another if such default is the direct consequence of his own wrong. I have held that the proper appeal tribunal for the plaintiff under Rule 28 is the Working Committee, and I am not prepared to say that if the defendant was mute before this Court, it must be deemed that he would necessarily be unable to justify his action to the Working Committee. I am of opinion that no *mala fides* has been established: the plaintiff's belief is not sufficient.

There remains only two material points to which I would advert. One is that, in this case the question whether or not the plaintiff's conduct was detrimental to the M.I.C. is not a question of law, but a question of fact, or of opinion, or of both. Speaking of domestic tribunals, Denning L.J. (as he then was) in *Lee* v. *The Showmen's Guild of Great Britain* said: "They "(the parties)" can, indeed make the tribunal the final arbiters on questions of fact", although they could not make it the final arbiter on questions of law. If the Working Committee are made the final arbiters of fact under Rule 28, then I do not think the facts of this case justify the Court intervening and taking the appeal on a question of fact out of their hands. In questions of ethics the Court will not interfere: (see Romer L.J. at 350 in *Lee* v. *Showmen's Guild*) and the question whether conduct of a member is detrimental to the interests of an association comes within that province.

The other point is whether this case is one in which the Court will interfere. I respectfully agree with the passages I have quoted from the judgments of Brett L.J. in *Dawkins* v. *Antrobus* and Denning L.J. in *Lee* v. *Showmen's Guild*. This case is one in which I have no hesitation in saying that the designated domestic tribunal is far more competent to determine the question than any Court in the land.

For the reasons I have given I dismiss this action with costs.

Action dismissed.

Solicitors: *R. R. Chelliah; Dato E. E. C. Thuraisingham.*

LOW KIM YAN v. TAY GUAT HIAN & ORS.

[C. A. (Thomson C.J., Hill and Good JJ. A.) May 16, 1960]

[J. B. — F.M. Civil Appeal No. 40 of 1959]

Damages — Loss of support arising from death of husband — Source of income irrelevant — Whether payments from father-in-law can be taken into account in assessing damages.

Maintenance — Legal obligation of husband.

This was an appeal against an award for damages which arose from the negligence of the appellant in driving a motor vehicle whereby the husband of the 1st respondent met his death. Prior to his death the deceased was a University student and he was in fact living on payments made to him by his father out of which he made certain payments to his wife for the support of herself and the children. Since losing the husband the 1st respondent had been receiving payments from her father-in-law. It was urged for the appellant that these should be taken into account in assessing the damages.

Held: (1) the source of the husband's income was irrelevant to the proceedings;

(2) when the deceased married the 1st respondent he incurred a legal obligation to maintain her and any children of the marriage and she acquired a legal right to be maintained by him and it is immaterial where he obtained the money to discharge his legal duty;

(3) there is no justification for the Court to take into account in assessing the damages the fact that since her husband's death the 1st respondent had been receiving payments from her father-in-law.

Cases referred to:—

(1) *Heatley* v. *Steel Co. of Wales Ltd.*, [1953] 1 All E.R. 489, 490.

(2) *Scott* v. *Musial* [1959] 3 W.L.R. 437, 441.

(3) *Baker* v. *Dalgleish Steam Shipping Co.* [1922] 1 K.B. 361, 371.

COURT OF APPEAL.

D. G. Rawson for appellant.

D. H. Murphy for respondents.

Thomson C.J. (delivering oral judgment): This appeal is against a judgment of Mr. Justice Neal whereby he awarded sums amounting in all to $35,000 for loss of support and $1,500 for funeral expenses to the first plaintiff who sued on her own behalf and for her two infant sons under the provisions of the Civil Law Ordinance.

The damages flowed from the negligence of the defendant in driving a motor vehicle whereby the husband of the first plaintiff met his death.

Prior to his death the deceased, who was the son of a fairly wealthy man, was a student pursuing his studies at some Institution in Singapore and he was in fact living on payments made to him by his father out of which he made certain payments to his wife for the support of herself and the children. I should say here that in my view the source of the husband's income was